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# IN THE
# COURT OF APPEALS OF INDIANA

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| DALE BEAVER, | ) | |
| | ) | |
| Appellant-Petitioner, | ) | |
| | ) | |
| vs. | ) | No. 25A03-0804-PC-199 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Respondent. | ) | |

APPEAL FROM THE FULTON SUPERIOR COURT
The Honorable Wayne E. Steele, Judge
Cause No. 25D01-0702-PC-47

**October 2, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**DARDEN, Judge**

## STATEMENT OF THE CASE

Dale Beaver appeals from the denial of his petition for post-conviction relief.

We affirm.

## ISSUE

Whether Beaver received ineffective assistance of trial counsel.

## FACTS

We adopt the statement of facts set forth in this Court's decision in *Beaver v. State*, No. 25A04-0409-CR-514, slip op. at 2 (Ind. Ct. App. Feb. 1, 2005), which reads, in pertinent part, as follows:

> On May 19, 2003 at approximately 2:23 a.m., Rochester police Officer David Carrell observed a white vehicle sitting in the city park. As Officer Carrell approached, he noticed an individual, who was subsequently identified as Beaver, "passed out or asleep" in the front seat dressed in women's clothing with the skirt pulled up around his waist, and his genitalia exposed.

Officer Carrell arrested Beaver for public indecency.

Upon Beaver's arrest, Officer Carrell impounded Beaver's vehicle. He and another officer conducted an inventory search at the sheriff's department. The search revealed, among other things, a glass pipe, a bank bag containing a large amount of cash, and two plastic bags containing methamphetamine. According to the inventory report prepared by Officer Carrell, he found the glass pipe inside of the center armrest. The bank bag was locked, but using a key found in the vehicle, one of the officers was able to open it. The officers discovered the methamphetamine inside the bank bag, which was

on the floor of the front passenger's side. Upon finding the methamphetamine, Officer Carrell obtained a search warrant but found no other contraband in the vehicle.

The State charged Beaver with methamphetamine possession with intent to deliver the drug within 1000 feet of a public park as a class A felony. On or about March 8, 2004, Beaver filed a motion to suppress.[1] The trial court held a hearing on Beaver's motion on March 15, 2004, during which his counsel argued that Officer Carrell did not have probable cause to arrest Beaver "and therefore . . . the subsequent search of him and his vehicle incident to his arrest" was unlawful. (App. 16). The trial court denied Beaver's motion to suppress.

Subsequently, Beaver pled guilty to class C felony methamphetamine possession, and the trial court sentenced him to eight years. He appealed his sentence, which this Court affirmed on February 1, 2005.

Beaver filed a petition for post-conviction relief on February 26, 2007,[2] and his memorandum in support thereof on September 24, 2007. He argued that his trial counsel was ineffective for failing to assert in the motion to suppress that "there was not a sufficient basis to impound [his] vehicle"; and that even if the inventory search had been valid, it "should have been discontinued at the time [officers] discovered the glass pipe because at that point, it was no longer an inventory search but instead, an investigatory search to determine if there were drugs in the vehicle." (App. 65-66).

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[1] Beaver does not provide a copy of the motion to suppress.

[2] Beaver does not provide a copy of his petition.

On June 8, 2007, the post-conviction court held a hearing on Beaver's petition for post-conviction relief. The post-conviction court admitted into evidence the transcript of the hearing on Beaver's motion to suppress. Beaver presented no other testimony.

On December 21, 2007, the post-conviction court denied the petition and entered its findings of fact and conclusions of law. Beaver filed a motion to correct error, which the post-conviction court denied on March 20, 2008.

DECISION

A post-conviction petitioner bears the burden of establishing his claims by a preponderance of the evidence. *Thompson v. State*, 796 N.E.2d 834, 838 (Ind. Ct. App. 2003), *trans. denied*; Ind. Post-Conviction Rule 1(5). When reviewing the denial of a petition for post-conviction relief, we will neither reweigh the evidence nor judge the credibility of the witness. *Id*. Thus, to prevail on appeal from the denial of post-conviction relief, the petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite to that reached by the post-conviction court. *Id*. We will disturb the post-conviction court's decision only if the evidence is without conflict and leads to but one conclusion and the post-conviction court has reached the opposite conclusion. *Id*.

Beaver contends that his trial counsel was ineffective.

> To establish a post-conviction claim alleging a violation of the Sixth Amendment right to effective assistance of counsel, a defendant must establish before the post-conviction court the two components set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). First, a defendant must show that counsel's performance was deficient. This requires a showing that counsel's representation fell below an objective standard of reasonableness and that counsel made errors so

> serious that counsel was not functioning as "counsel" guaranteed to the defendant by the Sixth Amendment. Second, a defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, meaning a trial whose result is reliable. To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is one that is sufficient to undermine confidence in the outcome. Further, counsel's performance is presumed effective, and a defendant must offer strong and convincing evidence to overcome this presumption.

*Overstreet v. State*, 877 N.E.2d 144, 151-52 (Ind. 2007) (citations omitted), *reh'g denied*, *petition for cert. filed*, (U.S. July 22, 2008) (No. 08-5470). "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." *Strickland*, 466 U.S. at 697.

Beaver argues his counsel failed to raise the following issues in the motion to suppress: (1) whether his vehicle was properly impounded; and (2) "whether the inventory search of [his] vehicle should have terminated when a locked bag was discovered and a search warrant should have been obtained." Beaver's Br. at 10.

Whether to file a particular motion is a matter of trial strategy. *Moore v. State*, 872 N.E.2d 617, 620 (Ind. Ct. App. 2007), *trans. denied*. "'[A]bsent an express showing to the contrary, the failure to file a motion does not indicate ineffective assistance of counsel.'" *Id.* (quoting *Glotzbach v. State*, 783 N.E.2d 1221, 1224 (Ind. Ct. App. 2003)). "'To prevail on an ineffective assistance of counsel claim based upon counsel's failure to file motions on a defendant's behalf, the defendant must demonstrate that such motions

would have been successful.'" *Moore*, 872 N.E.2d at 621 (quoting *Wales v. State*, 768 N.E.2d 513, 523 (Ind. Ct. App. 2002), *trans. denied*).

1. Impoundment

Beaver asserts that he received ineffective assistance of trial counsel when his counsel failed to allege in his motion to suppress that the impoundment of his vehicle was improper, and therefore, the inventory search was unlawful. We disagree.

> The Fourth Amendment protects persons from unreasonable search and seizure and this protection has been extended to the states through the Fourteenth Amendment. The fundamental purpose of the Fourth Amendment to the United States Constitution is to protect the legitimate expectations of privacy that citizens possess in their persons, their homes, and their belongings. For a search to be reasonable under the Fourth Amendment, a warrant is required unless an exception to the warrant requirement applies. The State bears the burden of proving that a warrantless search falls within an exception to the warrant requirement.
>
> A valid inventory search is a well-recognized exception to the warrant requirement. The underlying rationale for the inventory exception is three-fold: (1) protection of private property in police custody; (2) protection of police against claims of lost or stolen property; and (3) protection of police from possible danger. In determining the propriety of an inventory search, the threshold question is whether the impoundment itself was proper. An impoundment is warranted when it is part of "routine administrative caretaking functions" of the police or when it is authorized by statute. To prove a valid inventory search under the community caretaking function, the State must demonstrate the following: (1) "the belief that the vehicle posed some threat or harm to the community or was itself imperiled was consistent with objective standards of sound policing," and (2) "the decision to combat that threat by impoundment was in keeping with established departmental routine or regulation."

*Taylor v. State*, 842 N.E.2d 327, 330-331 (Ind. 2006) (citations omitted). "The question is not whether there was an absolute need to remove the vehicle but whether the decision

to do so was reasonable in light of the applicable standard." *Abran v. State*, 825 N.E.2d 384, 390 (Ind. Ct. App. 2005), *trans. denied*.

Here, Beaver called no witnesses during the hearing on his petition for post-conviction relief. The post-conviction court, however, admitted into evidence the testimony of Officer Carrell from the motion to suppress hearing. According to that testimony, at approximately 2:20 a.m., Officer Carrell observed Beaver's vehicle parked in an unattended Rochester city park, accessible by the public; further, he testified that the city parks closed at midnight. After placing Beaver under arrest, Officer Carrell impounded Beaver's vehicle and had it towed to the sheriff's department. According to his testimony, it was standard policy to impound a vehicle rather than leave it in a public place "to make sure that it doesn't get broken into and that it keeps the department from being liable for anything that's done to the vehicle while it's left there." (App. 24). The post-conviction court concluded that impounding the vehicle "was clearly reasonable given the time, location, and circumstances of the arrest." (App. 76-77).

Given the facts presented, we cannot say that Beaver has shown that a motion to suppress based on the propriety of the impoundment would have been successful as the decision to impound Beaver's vehicle was reasonable and pursuant to policy. *See* P-C.R. 1(5) ("The petitioner has the burden of establishing his grounds for relief by a preponderance of the evidence."); *Tapia v. State*, 753 N.E.2d 581, 587-88 (Ind. 2001). Thus, Beaver has failed to establish that his trial counsel's performance was deficient.

Furthermore, Beaver's trial counsel did file a pre-trial motion to suppress the evidence wherein he argued lack of probable cause to arrest Beaver. "Counsel is

afforded considerable discretion in choosing strategy and tactics, and we will accord that decision deference." *Sims v. State*, 771 N.E.2d 734, 741 (Ind. Ct. App. 2002), *trans. denied*.

2. Search Warrant

Beaver asserts that he received ineffective assistance of trial counsel when his counsel "failed to raise the issue of whether the inventory search of Beaver's vehicle should have terminated when a locked bag was discovered . . . ." Beaver's Br. at 10. We cannot agree.

Once the propriety of the impoundment of a vehicle has been established, the scope of the inventory must be evaluated in determining the reasonableness of an inventory search itself, as "[e]ven the lawful custody of an impounded vehicle does not itself dispense with the constitutional requirement of reasonableness in regard to the searches conducted thereafter." *State v. Lucas*, 859 N.E.2d 1244, 1250 (Ind. Ct. App. 2007) (quoting *Fair v. State*, 627 N.E.2d 427, 435 (Ind. 1993)), *trans. denied*.

> In order to insure that the search is not a pretext "for general rummaging in order to discover incriminating evidence[,]" the State must establish that the search was conducted pursuant to standard police procedures.
>
> In order to meet its burden, the State must do more than offer a mere statement of a police officer that the search was performed as a routine inventory. The circumstances of the intrusion must also indicate that the search was carried out under routine department procedures which are consistent with the protection of officers from potential danger and false claims of lost or stolen property as well as the protection of those arrested.
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> Both the location of the search and the primary responsibilities of the officer conducting the search may be considered indicia of pretext which draw into question whether the search was conducted in good faith. Inventory searches conducted at the impound lot by an officer assigned to

> such duties are greatly preferred to searches conducted at the scene, without a warrant, by the arresting officer.

*Lucas*, 859 N.E.2d at 1250 (citations omitted).

In *Lucas*, officers discovered a locked container in a van and forced the lock open with a pocketknife. Lucas filed a motion to suppress the evidence discovered inside the container. The State argued that officers had searched the van pursuant to standard procedure for inventorying vehicles and submitted a copy of the policy, providing that "'closed containers may be opened'" during an inventory search. *Id.* at 1248 (citation omitted). Finding the written policy unclear regarding locked containers, the trial court granted Lucas' motion to suppress. On appeal, this Court found no error in the trial court ordering the contents of the container suppressed where the policy made no reference to locked containers.

During the motion to suppress hearing, the trial court admitted into evidence a copy of the Rochester Police Department's "policy on vehicle impoundment and inventory." (App. 24). Officer Carrell testified that he had Beaver's vehicle towed to the sheriff's department, where he and another officer began an inventory pursuant to department policy. He further testified that he discovered "a glass pipe with some black residue," while the other officer discovered a locked bag. After opening the bag with a key found in the vehicle, the officers discovered what tests later revealed to be methamphetamine. The officers then halted the inventory search and obtained a search warrant.

Beaver has failed to provide this Court with a copy of the Rochester Police Department's policy for conducting an inventory search. Thus, he has not demonstrated that a motion to suppress the evidence contained in the bag would have been successful under *Lucas*. *See Moore*, 872 N.E.2d at 621.

Furthermore, the alleged illegal search of the bag would fall under the Fourth Amendment's inevitable discovery exception to the exclusionary rule, which "'permits the introduction of evidence that eventually would have been located had there been no error, for that instance 'there is no nexus sufficient to provide a taint.'" *Shultz v. State*, 742 N.E.2d 961, 965 (Ind. Ct. App. 2001) (quoting *Banks v. State*, 681 N.E.2d 235, 239 (Ind. Ct. App. 1997) (quoting *Nix v. Williams*, 467 U.S. 431, 438 (1984)), *trans. denied*. In this case, Officer Carrell could have obtained a search warrant based on the glass pipe discovered during the inventory search "and all the remaining evidence would have been inevitably and lawfully discovered in the execution of the search warrant." *Shultz*, 742 N.E.2d at 965. Beaver therefore has not shown a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *See Overstreet*, 877 N.E.2d at 152.

Finally, Beaver's counsel's decision to limit the motion to suppress to the issue of lack of probable cause would have been a matter of trial strategy, which is afforded considerable discretion. *Sims*, 771 N.E.2d at 741. We therefore cannot say that Beaver's counsel provided inadequate representation.

Affirmed.

FRIEDLANDER, J., and BARNES, J., concur.